



OFFICE OF THE COUNTY ATTORNEY

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PRIVILEGED AND CONFIDENTIAL

MEMORANDUM

October 7, 2005

To: Karen Orlansky, Director
Office of Legislative Oversight

Via: Marc Hansen, Chief *MPH*
Division of General Counsel

From: Clifford L. Royalty *CLR*
Associate County Attorney

Re: *Legal Issues Related to OLO's Clarksburg Town Center Fact-Finding Review:
Additional Responses from the Department of Park and Planning*

By memorandum dated September 23, 2005, you requested that this office comment on the answers that you received to a series of questions that OLO posed to the Maryland-National Capital Park and Planning Commission's Director of Park and Planning. The latest set of answers includes Park and Planning's responses to questions 4, 8, and 9. We have substantive comments concerning the responses to questions 4 and 8. We will begin with the former.

Question 4 requests a list of the land use approval documents that are typically generated by a proposed development. OLO inquires as to which of the documents "has the force of law." In response, Park and Planning correctly states that the executed site plan (which it refers to as the "signature set") is a "legally binding document." (See "Response to Question 4," p. 2). Park and Planning then opines that an applicant (for site plan approval) may "submit a signature set with features that are more restrictive than established by the Board." (See "Response to Question 4," p. 3). The more restrictive "development standards" in the signature set are "then binding on the Applicant." (See "Response to Question 4," p. 3). Park and Planning further opines that, if the signature set has more restrictive standards than those that "the Board originally approved," and the Applicant desires to "build to the Board-approved maximum development standards," then "the Applicant must submit a revised signature set for staff approval." (See "Response to Question 4," p. 3).

Park and Planning cites no law that permit an applicant to adopt more restrictive development standards than were approved by the Board and to then modify those stricter standards with staff approval. We do not read the governing provision of the Zoning Ordinance,

§ 59-D-3.4, as allowing for such a process. Park and Planning may be describing an existing practice, but that practice does not seem to be countenanced by the law. And the practice is problematic. Who determines whether a signature set contains features that are “more restrictive” than the Board-approved plan? And what standards govern that determination? So far as we can determine, there are none. In the context of the Clarksburg Town Center, this issue is particularly pertinent. Having both a Board-approved site plan and a staff-approved “signature set” is apt to generate confusion about which plan controls. Unless the lines of communication are particularly robust, that confusion could extend to DPS, the issuer of the building permits that are supposed to comply with the site plan. In our opinion, the “signature set” should not vary from the Board-approved site plan which, of course, should control development at the relevant site.

Question 8 requests a description of the “triggers that govern the sequence of government approvals in the development process.” In its response, Park and Planning claims that DPS may reject a building permit application that does not comply with the site plan. (*See “Response to Question 8,” p. 5*). Park and Planning then goes on to state that “Code Chapter 8 does not require that the Planning Board conduct any post permit approval inspections of a site . . .” (*See “Response to Question 8,” p. 6*). That is true but misleading. The Planning Board has the “exclusive authority to enforce violations of a Planning Board Action.” *Montgomery County Code*, § 50-41(k). A “Planning Board Action” includes a decision to approve a site plan. *Montgomery County Code*, § 50-41(a)(5). The Planning Board may revoke site plan approvals, issue stop works orders and citations, and generally initiate any enforcement action necessary to ensure site plan compliance. *Montgomery County Code*, § 50-41(j). A Planning Board revocation of a site plan invalidates any applicable building permits. *Montgomery County Code*, § 59-D-3.6. And M-NCPPC’s agents and employees may inspect property to ensure site plan compliance. *Md. Ann. Code*, art. 28, § 2-116.

Lastly, we have one quibble. In response to Question 9, Park and Planning states that a “challenge to a Planning Board citation” is “appealed to the District Court . . .” In fact, the challenge is not an “appeal.” It is an original action.

If you would like to discuss this matter further, please feel free to call me at 777-6739.

cc: Charles W. Thompson, Jr., County Attorney
Michael Faden, Senior Legislative Counsel
Malcolm Spicer, Associate County Attorney